Supreme Court, U. S.
FILED
AUG 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-2046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JAMES DAZET,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the
State of Louisiana

BRIEF FOR THE STATE OF LOUISIANA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the reliability of the information furnished by the identified informant concerning petitioner's possession and distribution of drugs was made manifest by the facts and circumstances set forth in the Affidavit for Search Warrant.

2. Whether there was any violation of petitioner's rights under the Fourth Amendment to the United States Constitution.

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OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported as *State of Louisiana v. Dazet*, 378 So.2d 1369 (La. 1980) and is set out in Appendix B of the petitioner's brief at page A-30 et seq.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This Statement is from the Louisiana Supreme Court Opinion, *State v. Dazet*, 378 So.2d 1369 (1980) and succinctly states the facts:

"On April 1, 1977, while working in illegal drug traffic on the east bank of Jefferson Parish, Louisiana, in an undercover capacity, Agent Grannan met Frank Torres. Torres stated that a friend of his had a large quantity of cocaine and marijuana and that he could sell Grannan any amount he wanted. It was then arranged that Grannan would meet Torres at the parking lot of Kaleb's Lounge at approximately six o'clock that night.

"Grannan conveyed this information to Agent J. Nelson, who made arrangements for Grannan to give $450 in recorded bills to Torres at the rendezvous. Other agents would then follow Torres to his source of supply.

"At six o'clock that night seven narcotic agents established a surveillance of the parking lot. Shortly thereafter Grannan met Torres and gave him the money, and Torres told Grannan he was going to his source and would meet Grannan at 6:45 at the same location with the drugs. Accordingly Torres departed in a 1975 Pontiac Grand Prix with no license plate.

"Agents on surveillance followed the vehicle as it proceeded to 1525 Aztec Street in Metairie, Louisiana, where the driver left the vehicle and entered the building. At approximately 7:05 Torres was seen to leave the apartment, enter his vehicle, and proceed to Kaleb's parking lot. There he met Grannan and sold him one-quarter ounce of cocaine, after which Torres informed Grannan that his "connection" had a quantity of Thai-Sticks (Thailand Marijuana) in addition to large amounts of cocaine. They then parted company.

"Shortly thereafter narcotic agents began an investigation into the activity of the occupant of Apartment A at the 1525 Aztec Street address. They learned from a confidential source that this apartment was occupied by Dorothy Gardner, a white female, and was frequented by James Dazet. Agents then checked the

Jefferson Parish Sheriff's Office Record Section. That source disclosed that Dazet had been arrested in the past for five felony offenses and was then on probation until 1979 as a result of a conviction for distribution of marijuana.

"The next day, April 2, 1977, Agent Nelson ascertained from Agent Renton of the Jefferson Parish Sheriff's Office Narcotics Division that Renton had a reliable confidential informant whose information had been proven reliable through independent investigation, who was familiar with the activity in Apartment A of the apartment house at 1525 Aztec Street. The confidential informant had stated to Renton that on numerous occasions while in that apartment he had observed large amounts of marijuana and cocaine there, and his most recent visit to the apartment was the preceding evening — April 1, 1977. He further stated that on several occasions he had purchased drugs from Dazet there, but he did not wish to purchase drugs from Dazet for evidence purposes because he feared for his own safety and well-being as well as that of his family.

"On this information the trial judge issued the search warrant on April 2, 1977. The search of Dazet's apartment followed. Marked bills used in the purchase by Grannan, a quantity of marijuana, cocaine and various drug paraphernalia were seized.

"At a pretrial hearing on the motion to suppress, Agent Nelson of the Sheriff's Narcotic Squad was call-

ed as a defense witness. He testified that the 1525 Aztec Street address was an apartment building with a common entrance to three apartments designated respectively as A, B and C. Previously a warrant was obtained on April 1, 1977, he said, to search apartment "C" occupied by Tom Lee. Lee, he said, was the confidential informer referred to in the affidavit supporting the warrant issued for the search of Apartment A, occupied by Defendant Dazet. Nelson was in and out of Lee's apartment when Lee informed on Dazet, but relied principally on Renton's version of Lee's statement because Renton was present at all times while Lee divulged his narcotic transactions with Dazet. Defense counsel's interrogation was designed to establish that Lee's reliability as an informer had not previously been verified. And the surveillance team which had followed Torres the previous day did not enter the apartment at that time or see which apartment Torres entered to obtain the narcotics from his 'connections'.

"Nelson also restated the facts set forth in the affidavit concerning the check of the records on Dazet whereby it was learned that he had previously been arrested for narcotic offenses and that Dazet was then on probation for distribution of marijuana.

"Thereafter Renton was called as a defense witness. He corroborated the testimony of Nelson and verified the information contained in the affidavit. Renton also said that after furnishing the information concerning Dazet, Lee called him and said that Dazet told him he

had seen the Drug Enforcement Administration files which indicated that he was an informant. As a result Lee 'became petrified' and had since refused to cooperate with the narcotics agents.

"In Lee's testimony as a defense witness he repudiated the testimony of the agents and the information contained in the affidavit to the effect that he, the confidential informant, had purchased narcotics from Dazet and had seen large amounts of marijuana and cocaine in Apartment "A" at 1525 Aztec Street. While admitting that he had been charged with possession of marijuana, that he knew Dazet, and that the officers offered not to charge his wife, he denied that any 'deal' was made to furnish law enforcement with information about Dazet. Nevertheless he did admit on cross-examination that he told the officers that someone was staying in Apartment A with Dazet, that he had been in Dazet's apartment and had seen marijuana there, while steadfastly denying that he said Dazet had sold drugs to him. He also denied that Dazet had threatened him.

"The motion to suppress was denied."

On October 12, 1977 the defendant appeared before Honorable Nestor L. Currault, Judge presiding, represented by Fred Kleppner, Esq. The prosecuting attorney was J. J. Amato, Esq. After jury selection, the defendant withdrew his former plea of not guilty and tendered to the State a plea of guilty (under *State v. Crosby*, 338 So.2d 584 (1976)) to Count 2, "possession with intent to distribute cocaine." The defendant was prop-

erly "Boykinized" and signed an Acknowledgment of Constitutional Rights and Waiver of Rights. (Tr. p. 47). The defendant, Dorothy A. Urquhart, was discharged on October 12, 1977.

James Dazet was sentenced on that same date to imprisonment at hard labor for five years.

The Louisiana Supreme Court heard the petitioner's appeal and affirmed the conviction and sentence on December 13, 1979. *State v. Dazet*, 378 So.2d 1369 (1980). Rehearing was denied on January 28, 1980. Three Associate Justices concurred in the opinion without written reasons.

Application for Writ of Certiorari was made to the United States Supreme Court on June 26, 1980 (No. 79-2046).

REASONS FOR DENYING THE WRIT

The Writ Should Be Denied Because Identified Informant (Lee) Did Furnish Reliable Information In The Past, And Details Of The Events That Led To A Drug Transaction That Took Place In Plain View Of Narcotics Agents.

In order to place the concept of probable cause in its proper perspective a few general considerations should be noted at the outset. Probable cause under the Fourth Amendment exists where the facts and circumstances are within the affiants' knowledge, and of which he has

reasonable trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288. One of the basic guidelines given by the United States Supreme Court for determining what constitutes a showing of probable cause is found in *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11 (1933). In *Nathanson,* a warrant was issued upon the sworn allegation that the affiant had cause to suspect and did believe that certain merchandise was in a specified location. The court noted that the affidavit stated only a mere affirmation of suspicion and belief without any statement of adequate supporting facts, and announced the following rule:

> "Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." 290 U.S. at 47, 54 S.Ct. at 13.

In *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245 (1958) the affiant swore that the defendant did receive and conceal narcotic drugs with knowledge of unlawful importation and the court stated the guiding principles to be:

> "That the inferences from the facts which lead to the complaint must be drawn by a neutral

> and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369. The purpose of the complaint, then, is to enable the appropriate magistrate to determine whether the probable cause required to support a warrant exists. The commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. We should not accept without question the complainant's mere conclusion, 357 U.S., at 486, 78 S.Ct. at 1250."

The following cases will attempt to explore the various tests this Court has used in determining whether or not a showing of probable cause has been established.

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960) involved a prosecution for the violation of federal narcotic laws. The petitioner claimed the affidavit was insufficient to establish probable cause because it did not set forth the affiant's personal observations regarding the presence of narcotics in petitioner's apartment, but rested wholly on hearsay. The affiant claimed no direct knowledge of the presence of narcotics in the apartment but swore that he had been given information by an unnamed informant that the petitioner kept narcotics at his apartment and that the informant had on

many occasions bought narcotics from petitioner at the location. The affiant also swore that the informant had given information on previous occasions which was correct and that the same information regarding petitioner had been given the narcotic squad by other sources of information and that petitioner was a known user of narcotics. The court upheld the validity of the warrant and stated the following:

> "* * * The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An Affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.
>
> In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is *reasonably corroborated by other matters within the officer's knowledge.*
>
> What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hear-

> say, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safe-guards governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant so that the evidence in possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded."
>
> *We conclude therefore that hearsay may be the basis for a warrant.* (Emphasis added.) 362 U.S. at 269-271, 80 S.Ct. 755-56.

The court in *Jones* went on to note that the commissioner did not have to be actually convinced of the presence of narcotics in the apartment, but that there was a substantial basis for him to conclude that narcotics were probably present in the apartment and that was sufficient. 362 U.S. 270, 271, 80 S.Ct. 725, 736.

In *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965) the court applied the rationale of *Jones*, supra, and upheld the validity of the search warrant. In this case the defendant was convicted of possessing and operating an illegal distillery. The affidavit alleged that large amounts of sugar were taken to the defendant's house by automobile on several occasions, that five-gallon cans were also seen being taken into the house, and that federal investigators smelled the odor of fermenting mash on two occasions when they walked past the house. The affiant swore that the information was based upon his personal knowledge and from information obtained from federal investigators assigned to the case. The court made the following observation:

> "* * * While a warrant may be issued only upon a finding of probable cause, this court has long held that the term probable cause means less than evidence which would justify condemnation, and that a finding of probable cause may rest upon evidence which is not legally competent in a criminal trial. 380 U.S. at 107, 85 S.Ct. 747.
>
> — the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a *commonsense and realistic fashion*. They

are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. *However, where these circumstances are detailed, where reason for crediting the source of this information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense, manner.* Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants." 380 U.S. at 108, 109, 85 S.Ct. at 746. (Emphasis added).

The court held in this case that the affidavit, if read in a commonsense way rather than technically showed sufficient facts to establish probable cause, and also noted that the affidavit was detailed and specific and set forth many of the underlying circumstances. Furthermore the U.S. Supreme Court pointed out that observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. 380 U.S. 102, 108-112, 85 S.Ct. 741, 746-747.

In *Harris v. United States,* 403 U.S. 575, 91 S.Ct. 2075 (1971) the U.S. Supreme Court looked to the totality of the circumstances in determining that there was a substantial basis for a finding of probable cause for the affidavit stated that he had a reputation for trafficking in illegal spirits; that on a prior occasion the local police had located illicit whiskey in an abandoned house under defendant's control; that the affiant had received sworn oral information from a confidential informant, who feared for his life should his name be revealed, that he had purchased whiskey from defendant's residence repeatedly over a period of two years; and that the informant asserted that he knew of another person who bought whiskey from defendant's house within the past two days. The Circuit Court had reversed petitioner's conviction on the grounds that the affidavit was insufficient because no information was presented to enable the magistrate to evaluate the informant's

reliability or trustworthiness and therefore inadequate under *Aguilar*, and relying on *Spinelli*, determined that the remaining allegations of the affidavit failed to supply independent corroboration. The Supreme Court, however, noted that the personal and recent observations of the informant of criminal activity showed that the information had been gained in a reliable manner *which the tip failed to do in Spinelli*. The court cautioned about being hypertechnical in requiring an affidavit to show probable cause even though there was no reference to the informer's reliability.

> "* * * While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a factual basis for creating the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant." 403 U.S. at 579-580, 91 S.Ct. 2080.

The court then distinguished the case at hand and *Jones* from *Spinelli:*

> "* * * *Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones*. And unless *Jones* has somehow, without acknowledgment, been overruled by *Spinelli*, there

would be no basis whatever for a holding that the affidavit in the present case is wanting. The affidavit in the present case, like that in *Jones*, contained a substantial basis for crediting the hearsay. Both affidavits purport to relate the personal observation of the informant — a factor that clearly distinguishes *Spinelli*, in which the affidavit failed to explain how the informant came by his information. Both recite prior events within the affiant's own knowledge — the needle marks in *Jones* and Constable Johnson's prior seizure in the present case — indicating that the defendant had previously trafficked in contraband. There prior events again distinguish *Spinelli*, in which no facts were supplied to support the assertion that Spinelli was 'known * * * as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.' " 403 U.S. at 581, 91 S.Ct. at 2081.

The court also held that reputation, while standing alone was insufficient to establish probable cause, *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11 (1933), but was not irrelevant when supported by other information. Furthermore, the court observed that it is a practical consideration upon which a magistrate may properly rely in assessing the reliability of an informant's tip.

> "* * * To the extent that *Spinelli* prohibited the use of such prohibitive information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation." 403 U.S. at 583, 91 S.Ct. 2082.

The court also held that there was another reason for crediting the informant's tip in that the affidavit recited the extrajudicial statements of a declarant who, not only feared for his life, but also admitted his commission of a crime which carried its own indicia of credibility.

Article 162 of the Louisiana Code of Criminal Procedure provides that a search warrant be issued only upon probable cause established to the satisfaction of the judge by the affidavit of a credible person reciting facts establishing cause for the issuance of the warrants. The proof required to establish probable cause for issuance of a warrant is less than the amount of evidence which would justify condemnation. *Loche v. U.S.*, 7 Cranch 339, 3 L.Ed. 364.

The Supreme Court of the United States in considering the question of probable cause for the issuance of a search warrant has held the basis for such probable cause may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States*, 358 U.S. 307. In *Brinegar v. U.S.*, 338 U.S. 160, 176,

93 L.Ed. 1879, 1890, 69 S.Ct. 1302 (1949), the court held that "there is a large difference between the two things to be proved — guilt and probable cause — as well as between the tribunals which determine them and therefore a like difference in the quanta and modes of the proof required to establish them."

Thus, hearsay may be the basis for issuance of a warrant so long as there is a substantial basis for accrediting of the hearsay. *Jones v. United States*, 362 U.S. 257, and in *Aguilar* we recognize that an affidavit may be based on hearsay information that need not reflect the direct personal observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that any informant involved whose identity need not be disclosed was credible or his information reliable.

The court in *Ventresca*, supra, stated that affidavits of search warrants such as the ones involved here must be tested and interpreted by the magistrate in the courts in a commonsense and realistic fashion. They are normally drafted by non-lawyers in the midst of the haste of a criminal investigation. Technical requirements of elaborate specificity once enacted under a common law "pleading" have no proper place in this area.

In *Berger v. New York*, 338 U.S. 41, the Supreme Court held that probable cause under the Fourth Amendment exists when the facts and circumstances within

the affiant's knowledge and of which he has reasonable cause to believe that an offense has been, or is being committed.

Petitioner relies mainly on the cases of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 and *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584. Because Fourth Amendment cases of reasonableness or probable cause necessarily rest on the facts and circumstances of each case the State contends that the facts of the case at bar take the instant case beyond the rule of *Aguilar* and *Spinelli*.

In *Aguilar*, the search warrant stated only that they "have received reliable information from a credible person." In the instant case, the affiant stated in the affidavit that the "informant they received their information from has been successful in the clearing up on about 15 residence burglaries in the Algiers area. Nine of the fifteen were with convictions and four of the other charges are pending in the court." Thus, in the instant case, the affiant has laid grounds upon which the reliability and credibility of the information is based.

Also, the totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant. Hence, the affidavit here is a far cry from "mere suspicion" of "affirmance of belief", and not only because it was based on a reliable informer, but also on *personal surveillance by the affiant himself.* THE COURT IN *AGUILAR* WAS CAREFUL TO POINT OUT THAT ADDITIONAL INFORMATION OF THE KIND

PRESENTED IN THE AFFIDAVIT IN THE INSTANT CASE WOULD BE HIGHLY RELEVANT: "IF THE FACT AND RESULTS OF SUCH A SURVEILLANCE HAD BEEN APPROPRIATELY PRESENTED TO THE MAGISTRATE, THIS WOULD OF COURSE, PRESENT AN ENTIRELY DIFFERENT CASE." 378 U.S. at 109, N.1, 12 L.Ed.2d at 725. See *U.S. v. Eisner*, 297 F.2d 595, Sup.Ct. denied cert. 82 S.Ct. 947, *Evans v. U.S.*, 242 F.2d 534, S.Ct. denied cert. 77 S.Ct. 1059, *U.S. v. Ramirez*, 279 F.2d 712, 715, *U.S. v. Meeks*, 313 F.2d 464.

This Court denied certiorari in *Eisner*, although the affidavit there stated only that "information has been obtained by S. A. Clifford Anderson . . . which he believes to be reliable . . . , 297 F.2d at 596 and in *Evans*, where the affiant was a man who "came to the headquarters of the federal liquor law enforcement officers and stated that he wished to give information . . . ," 242 F.2d at 535.

In *Carroll v. U.S.*, 267 U.S. 132, 162, 69 L.Ed. 543, 556, 45 S.Ct. 280 (1925) the court found that probable cause exists where "the facts and circumstances within their (the officers) knowledge and of which they had reasonable trustworthy information (are) . . . sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

In *Brinegar v. U.S.*, 338 U.S. 160, 176, 93 L.Ed. 1879, 1890, 69 S.Ct. 1302 (1949) Mr. Justice Rutledge stated

that "these long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability. THE RULE OF PROBABLE CAUSE IS A PRACTICAL NON-TECHNICAL CONCEPTION AFFORDING THE BEST COMPROMISE THAT HAS BEEN FOUND FOR ACCOMMODATING THESE OFTEN OPPOSING INTERESTS, requiring more would unduly hamper law-enforcement." As Justice Clark states in his dissenting opinion in *Aguilar*, "there is no rigid academic formula for the unrigid standards of reasonable and probable cause laid down by the Fourth Amendment. This would lead to an obstruction of the administration of criminal justice."

The court in *Spinelli*, supra, stated that in the absence of a statement detailing the manner in which the information was gathered by the informant, it is especially important that the tip be described so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The Court should look to the totality of the circumstances in determining that there was a substantial basis for a finding of probable cause for issuance of the warrant.

In the instant case, the affidavit set forth that Torres arranged to make the sale, set up the meeting place, and asserted his "connection" had ample stocks of marijuana and cocaine. Following this disclosure he proceeded to the "source" at 1525 Aztec Street under surveillance. He entered the three-apartment building and exited with the drug, proceeded to the pre-arranged meeting place and sold the drug to an undercover agent, all under strict surveillance of a number of narcotic agents. One of them signed the affidavit.

These facts do establish that contraband drugs were located in one of the three apartments at 1525 Aztec Street. A search and seizure of Apartment C that very night eliminated that apartment as a possible repository of "a quantity of Thai-Sticks (Thailand Marijuana) in addition to a large amount of cocaine." Only Apartments A and B remained, therefore, as possible sources of the drugs.

On the basis of information obtained from the confidential informant, the agents began an investigation into the activity of the occupant of Apartment A. They found that Dazet was a frequent visitor at that apartment, he had been arrested in the past for five felony offenses and was currently on probation for a dis-

tribution of marijuana conviction. All of this appears in the affidavit.

While the conclusion that Dazet's apartment was the source of Torres' illicit source of narcotics, arrived at by the investigating officers, the affiant and the issuing magistrate, may not be infallible, the conclusion is nevertheless based upon sound and reasonable probabilities. Only the fact that Apartment B had not been checked out as a repository of drugs remained to establish with certainty that Apartment A was the repository. A process of elimination requires such a conclusion. The issuing magistrate's finding of probable cause is also well-founded because the information received from Lee that Dazet lived in Apartment A and dealt in narcotics there was verified and considered reliable when the investigators ascertained that Dazet lived in Apartment A, he was on probation as a result of a conviction for distributing marijuana, and he had also been arrested several times in the past.

Other support for the informant's reliability is the underlying facts he disclosed to the agents. He said Dazet had sold drugs to him and he had seen a large quantity of cocaine and marijuana in Apartment A. (While the informant Lee later denied this in part, at the hearing the trial judge obviously did not accept the denial as credible.) In any event these underlying facts upon which the informant based his disclosure were such that they did add reliability to his statement when the occupant of Apartment A was known by the issuing magistrate to be a convict and dope peddler.

In addition, the affidavit does state that a search warrant was executed on Lee's apartment and the confidential informant was arrested by the Jefferson Parish Sheriff's Office, Narcotic Division agents within 24 hours prior to the seizure in Dazet's apartment. The fact of the informant's arrest by the agents and that he was not a mere "tipster" creates an even stronger presumption of reliability. *United States v. Harris,* 403 U.S. 573 (1971).

A magistrate needs only a substantial basis to determine that evidence was probably located where the informant said it was, it need not be "an open and shut case," only reasonable probabilities are required to support the issuance of the warrant. *Jones v. United States,* 362 U.S. 257 (1960). As an example, the Fifth Circuit in *Bastida v. Henderson,* 487 F.2d 860 (1973) approved a magistrate's warrant based on "the whole picture disclosed to him," stating that he was entitled to use common sense to support his actions.

This attitude harks back to the fundamental principles of reason enshrined in the Constitution's Fourth Amendment and the decision of the United States Supreme Court in *Ventresca v. U.S.,* 380 U.S. 102 (1965) where the Court wrote:

> "As *Spinelli* observed, 'in judging probable cause magistrates are not to be confined to niggardly limitations or by restrictions on the use of their common sense' and 'their deter-

> mination of probable cause should be paid great deference by reviewing courts.' 397 U.S. 419, 89 S.Ct. 590. Further, where the law enforcement officers have respected the constitutional mandate to secure a warrant before searching, 'although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.' "

The law encourages officers to go to a magistrate before a search is made if feasible, and they must not be held to the rigid technical legalities to which judges and lawyers are held in the preparation of their affidavits.

In *U.S. v. Ventresca*, 380 U.S. 102, 108, 132 L.Ed.2d 684, 688, 85 S.Ct. 741 (1965) the court held that "if the teachings of the court cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."

Moreover, if the courts become increasingly technical and rigid in their demands upon police officers, they may make it increasingly easy for criminals to operate, detected but going unpunished. Thus, a sig-

nificant movement of the law beyond its present state would be unwarranted, unneeded, and dangerous to law enforcement efficiency.

Therefore, the State contends the affidavit in support of the issuance of the search warrant was valid and all evidence seized thereunder admissible.

CONCLUSION

The law as stated above and the facts as indicated above lead to the conclusion that the petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ABBOTT J. REEVES, ESQ., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on Petitioner by mailing copies thereof in a duly addressed envelope to Ferdinand J. Kleppner, Esq., Grisbaum and Kleppner, Professional Building, 3224 North Turnbull Drive, Metairie, LA 70002, this ____ day of August, 1980.

I further certify that all parties required to be served have been served.

ABBOTT J. REEVES, ESQ.